IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

CITY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF RUTHERFORD, BOGOTA, DEMAREST, HARRINGTON PARK, HASBROUCK HEIGHTS, NORWOOD AND THE TOWNSHIP OF TEANECK AND CITIZENS UNITED TRANSIT COMMITTEE,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now appellants[1] and petition this Honorable Court for rehearing of the per curiam decision entered herein March 2, 1959, granting motions of appellees to

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[1] County of Bergen, State of New Jersey; County of Rockland, State of New ork; the Boroughs of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood and The Township of Teaneck, municipal corporations of the State of New Jersey; and Citizens United Transit Committee, an unincorporated association of users.

affirm the decision of the District Court and affirming the judgment entered thereupon.

JURISDICTION

This petition is filed pursuant to Rule 58, paragraph 1, of the Revised Rules of this Court, and in accordance with the Order of this Court herein dated March 11, 1959 directing this petition for rehearing to be filed on or before March 18, 1959.

Notice of Appeal herein was filed by appellants on December 29, 1958. Appellants' Statement as to Jurisdiction was filed four days later on January 2, 1959 pursuant to order of the District Court as a condition to the stay of its judgment and decree therein. A Motion to Affirm was filed by appellee, The New York Central Railroad Company, on January 13, 1959, and by appellees, The United States of America and Interstate Commerce Commission, on January 29, 1959. Brief of Appellants in Opposition to Appellees' Motions to Affirm was filed on February 17, 1959. A per curiam decision granting appellees' Motions to Affirm was entered herein by this Court on March 2, 1959.

REASON FOR PETITION FOR REHEARING

In support hereof appellants assert that the judgment thus affirmed is in direct conflict with and contrary to, *inter alia,* the earlier holding of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939); that, therefore, it alters said earlier decision; and that this Court, in affirming, did so without an appreciation of the impact thus engendered against said earlier decision and, hence, acted contrary to the real intent of this Court.

SUMMARY OF ARGUMENT

The jurisdiction of the District Court was invoked under several statutes but particularly under 28 USC § 1336. The District Court, however, found itself to be without jurisdiction under said § 1336 and, therefore, dismissed the action thereunder and declined to consider on its merits the validity of the action of the Commission there challenged. In so doing the District Court acted contrary to and probably in ignorance of the significance of *Rochester Telephone Corp., supra,* which significance, through inadvertence, was not especially called to its attention. Until now, neither has it been called to the attention of this Court. Therefore, because of the serious damage to *Rochester Telephone Corp., supra,* affirmation herein has engendered, this Court is asked to rehear this matter.

ARGUMENT

The Court, in affirming per curiam the decision below, quite evidently has acted under the same misunderstanding as did the District Court which concluded itself to be without jurisdiction under § 1336, 28 U. S. C. (1952), upon the theory that:

> "No 'order' of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under § 1336 *supra.*"[2] (JS 5a)[3]

[2] The NOTICE of the Commission actually did not say that it would not investigate the Complaints; this, apparently, was left to implication. What the NOTICE did say was that the Commission ". . . has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part." (JS 30a)

[3] "JS" denotes Appellants' Jurisdictional Statement; "5a" denotes page 5 of the appendix thereto.

and, consequently, ". . . the action is not one to 'enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission . . .'" (JS 5a) citing and quoting from in support thereof *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299 (1927), and *cf. Rochester Telephone Corp.* v. *United States, supra.* Thereupon, the District Court declined to decide under 28 U. S. C. § 1336 (1952) the case on the merits relating to the validity of the action taken by the Commission under § 13a(1), 49 U. S. C.

But the cited authorities do not support the contention of the District Court and, indeed, are in direct conflict with it. It is inescapable that the District Court failed to understand the concepts advanced, for its decision, summarily affirmed by this Court, revives the once lively so-called "negative order" doctrine of *Procter & G. Co.* v. *United States*, 225 U. S. 282 (1912) which this Court, in *Rochester Telephone Corp., supra,* expressly laid to rest.

Rochester Telephone Corp., supra, 307 U. S. from page 129, found that the then prior decisions involving the "negative order" doctrine fell into three categories:[4]

> "(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission . . .
>
> "(2) Where the action sought to be reviewed declines to relieve the complainant from a statu-

[4] For convenience these three categories hereinafter will be identified and referred to as Category (1), (2) or (3) respectively without repeating their content each time.

tory command forbidding or compelling conduct on his part . . .

"(3) Where th action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person."

This Court (through Mr. Justice Frankfurter) went on to exemplify these three categories, the first of which was found to have existed in *Los Angeles & Salt Lake R. R. Co., supra,* where the "order" sought to be reviewed did not of itself adversely affect complainant but only would affect his rights adversely on the contingency of some future administrative action. Such a situation is presented by an attempt to review a valuation made by the Commission which has no immediate legal effect although it may form the basis of a subsequent rate order. That was the situation obtaining in *Los Angeles & Salt Lake R. R. Co., supra,* which this Court in *Rochester Telephone Corp., supra,* cited as an example of Category (1):

"The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a 'final valuation' under the Valuations Act [March 1, 1913, 37 Stat. at L. 701, chap. 92, 49 U. S. C. A. § 19a]: *'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right*

> *or obligation.*' United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 309, 310, 71 L. ed. 651, 655, 656, 47 S. Ct. 413." *Rochester Telephone Corp., supra,* 307 U. S. at pages 130, 131 (italics supplied)

In citing *Los Angeles & Salt Lake R. R. Co., supra,* and quoting therefrom the above italicized language (JS 5a), the District Court in the instant case quite mistakenly conceived the action of the Commission under Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., to fall into those decisions of Category (1), a misconception made painfully clear from a knowledgeable reading of *Rochester Telephone Corp., supra;* for the wrong here sought to be remedied is immediate without that further action of the Commission required of a Category (1) case.

It is almost inescapable that the instant case falls into Category (3). That is, the action of the Commission sought to be reviewed [*i.e.,* its decision not to investigate] does not forbid or compel conduct on the part of the person seeking review [*i.e., appellants*] but is attacked because it does not forbid or compel conduct by a third person [*i.e.,* does not forbid The New York Central Railroad Co. from discontinuing its service or, alternatively, compel it to continue the service]. The foregoing sentence has been couched in language identical to that used by this Court in *Rochester Telephone Corp., supra,* in an effort to illustrate how completely the instant case is controlled by that decision. And, unlike Category (1), federal courts do have jurisdiction under 28 USC § 1336 to determine cases falling into Category (3).

(A) If the District Court were correct and this is a Category (1) case, then the only person entitled to

judicial review of the Commission's action under Section 13a(1) of the Act is the carrier and then only after the Commission has investigated and affirmatively ordered the carrier to continue the service sought to be discontinued. That is to say, even after a full hearing in which they participated throughout, appellants and others similarly situated, under the holding of the District Court here affirmed, could not test the action of the Commission in a Section 13a(1) case notwithstanding the express statutory provisions of 28 USCA §§ 1336, 2321, 2323. This is true, because even after a full investigation and public hearing if the Commission does not find and conclude that the service sought to be discontinued should, in fact, continue in operation, then the effect of its determination would be identical to that if it had, in the first instance, elected not to investigate or otherwise require continuance of the service. The investigation merely terminates as though it had never existed.

For example, in its very first determination under Section 13a(1) wherein a full investigation was had,[5] the Commission a few weeks ago concluded merely to cease its investigation into the matter. There was issued no order as understood by the District Court to be necessary for judicial review under § 1336, 28 USC. There was merely a discontinuance of the investigation; the Railroad did the rest. There was no order of the Commission directing the Railroad, or anyone else for that matter, *to do, or refrain from doing, anything;* it did not *extend or abridge any power or facility;* subject *the carrier to any liability or future status or condition;* or *determine any right or obligation* in any

[5] *Great Northern Ry. Co.—Discontinuance of Service,* I. C. C. Finance Docket No. 20[illegible]8 (1959).

respect in any manner more than if the Commission, as it did in the instant case, had elected in the first place to conduct no investigation or otherwise require the railroad service to continue. And, yet, in abandoning its investigation the Commission may well have acted contrary to all of the evidence and otherwise in a most unjust and unlawful manner. And, yet, participants in the investigation, under the theory of the District Court, are powerless to act, because there exists no affirmative "order". The only time judicial review could be had of anything done or omitted to be done by the Commission under Section 13a(1) would be when the Commission, after an investigation, directs the railroad service to continue, and then judicial review could be had only upon complaint of the railroad. It hardly seems possible to find from the language of Section 13a(1) a congressional intent to guarantee railroads complete judicial review of adverse decisions while denying users and other interested participants any judicial review at all. *Cf. United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949).

Because the premise is incorrect, the theory of the District Court as to its lack of jurisdiction under 28 USC § 1336 is incorrect.

(B) That which has been stated under (a) above is merely one logical consequence of the action of the District Court; it is not believed the District Court followed through this consequence of its own decision and, hence, acted in ignorance thereof. Rather did the District Court quote out of context from *Los Angeles & Salt Lake R. R. Co., supra.*

Certainly the instant proceeding falls into Category (3) as defined by *Rochester Telephone Corp., supra.*

And there this Court laid down four prerequisites to the existence of judicial review:[6]

> (1) Were appellants authorized to file their complaint with the Commission?
>
> (2) Did the complaint thus filed give rise to an adjudication—constituting a case or controversy?
>
> (3) In seeking judicial review were the requisites of equity by conventional criteria satisfied?
>
> (4) Were appellants within the express language of Congress authorizing participation in the suit below?

The instant case satisfies readily all four of these prerequisites. (1) Section 13a(1) expressly provides for the filing of complaints and, although unlike § 13(1) and (2) which expressly define those parties who may file complaints, there can be no doubt but that appellants and other similarly situated were contemplated by the Congress as complainants therein. This belief is fortified by a process of elimination. If not appellants and other similarly described, then who would file a complaint as provided by Section 13a(1)—not the Commission because § 13a(1) provides that the Commission may act ". . . either upon complaint *or upon its own initiative without complaint*" (italics supplied). Consequently, if the Commission were to act upon its *own initiative,* it would do so *without complaint.* And certainly the railroad was not intended to be the complaining party, because it would then be complaining of its own action. Clearly, then, the users of the service and those other persons described in § 13(1) and (2)[7]

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[6] *Rochester Telephone Corp.* v. *United States, supra,* 307 U. S. at p. 136.

[7] See also 28 USC § 2323.

were intended as persons authorized to file complaints under § 13a(1), because otherwise the provision for the Commission to proceed *either upon complaint* would be meaningless.

Furthermore, in the instant case the notice posted by the railroad in its terminals and subsequently filed with the Commission contained the following invitation which appellants promptly accepted.

> "Any person objecting to such discontinuance should promptly notify the Interstate Commerce Commission, Washington 25, D. C."[8]

(2) The second prerequisite— whether the complaint to the Commission gave rise to an adjudication constituting a case or controversy—was satisfied in at least two respects.[9] (a) Appellants challenged the validity of the notice filed by the railroad and alleged that it failed to comply with statutory requirement. (b) Appellants also challenged the evidentiary foundation of the railroad's action, requested an opportunity to offer evidence on public convenience and necessity and considerations of interstate commerce, and offered to prove thereby the existence of these three standards as requiring continuation of the service, albeit at a quantity reduced to coordinate with the West Shore commuter trains of which ferries constitute the essential and sole link to New York City. The action, or perhaps, inaction of the Commission adjudicated all of these contentions contrary to the interests of appellants. Thus, there existed a "case or controversy" of the same quality as exists in the companion case under § 1(18) of the Act, 49 USC (This Term, No. 41).

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[8] Plaintiffs' Exhibit No. 1.

[9] See *Rochester Telephone Corp., supra*, 307 U. S. at p. 140.

(3) The third requirement, the existence of equitable prerequisites as determined by the conventional criteria, are present in the instant case, for the harm and injury threatened to appellants by the proposed discontinuance of service would be immediate and irreparable for which there exists no adequate remedy at law.[10] Indeed, there has never existed any doubt on this point, and the District Court, fully recognizing the immediate and irreparable nature of the threatened injury, without legal redress, readily issued its interlocutory injunction in the instant case as it had a year earlier in the § 1(18) case (This Term, No. 41). *Bd. of Public Utility Comm.* v. *United States,* 158 F. Supp. 98 (DC N.J. 1957).

(4) And, finally, the fourth prerequisite is satisfied, for appellants are included within the express language of paragraph 3, § 2323, 28 USC:

> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof."

The present suit was instituted by State of New Jersey, et al., appellants in No. 621 (This Term), against all three appellees herein. Appellants herein, pursuant to 28 USC §2323, upon due application, were granted leave by the District Court to intervene as plaintiffs (JS 4a).[11]

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[10] 19 Am. Jur., Equity, § 29

[11] And, of course, once having been permitted to intervene, appellants were then, entitled to proceed as though they were original plaintiffs.

(C) The instant case presents a situation almost identical to that of *Procter & G. Co.*, supra[12] and would be controlled by the "negative order" doctrine there launched had it not been for the remedial holding of *Rochester Telephone Corp.*, supra.

Because the instant case so readily satisfies the requirements of Category (3) of *Rochester Telephone Corp.*, supra, and is so dissimilar to those decisions of Category (1) as to place jurisdiction clearly in the District Court pursuant to 28 USC § 1336, appellants did not contest seriously the contrary contention advanced by the railroad. As a result, the District Court was unadvised of the serious consequences flowing from its determination that it was without jurisdiction to determine the matter under § 1336, 28 USC, in accordance with the procedure of § 2321 *et seq* of that title. Indeed, *Rochester Telephone Corp.*, supra, was not pressed upon the District Court in a manner calculated to have that Court attach any particular significance to the holding. Accordingly, the District Court failed to comprehend or appreciate the significance of its determination in light of *Rochester Telephone Corp.*, supra.

It is, of course, for this Court alone to determine whether to invalidate and reverse its holding in

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[12] *Procter & G. Co.*, supra, was a suit commenced under 36 Stat. 1148 before the old Commerce Court the jurisdiction of which under 36 Stat. 1148 was transferred to a 3-judge District Court by 28 USCA § 1336 (see Historical Note preceding annotation). There, Procter & G. Co. filed a complaint with the Commission which the Commission dismissed, because the complaint requested the Commission to compel action by a third party, a railroad. On appeal this Court held there to exist no jurisdiction under 36 Stat. 1148 (now 28 USCA § 1136). Of course, that decision was reversed by *Rochester Telephone Corp.*, supra.

Rochester Telephone Corp., supra, and to reinstate the negative order doctrine of *Procter & G. Co.*, supra. However, appellants do not believe this Court to intend for its affirmation of the District Court herein to accomplish this undesirable end and, accordingly, ask for rehearing.

CONCLUSION

It has not been argued here whether the Administrative Procedures Act, 5 USC § 1009 (1952) at least codified the law then existing in 1946, the year of its original enactment [and probably enlarged upon it] so as to make inapplicable the holding of this Court in *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), inasmuch as *Rochester Telephone Corp.*, supra,[13] defines the scope of judicial review in phrases similar to the Administrative Procedures Act. Neither have the numerous other contentions heretofore advanced been argued here, although anyone of them would be sufficient to justify reversal of the District Court. In the event rehearing is granted, as it surely must, this is not to be construed as a waiver of these other issues, for by this petition your appellants reiterate each and every issue set forth in their Statement as to Jurisdiction and their arguments presented in their Brief in Opposition to Appellees' Motions to Affirm.

Rather is this petition intended to call to the attention of this Honorable Court that which perhaps might be considered the most serious defect in the decision

[13] 307 U.S. at p. 140. There is now pending before the Congress a bill to amend the Administrative Procedures Act, 5 U.S.C. §§ 1001 to 1011, which amendment is calculated to remedy the error of the District Court herein. S. 1070, 86th Cong., 1st Session (February 16, 1959).

of the District Court summarily affirmed herein. The difficulty is magnified by the fact that *Rochester Telephone Corp.*, supra, so clearly supports the contention of jurisdiction under § 1336, 28 U.S.C., as advanced by appellants, that it was never seriously considered in doubt until the decision of the District Court was handed down.

Subsequent utterances upon the two floors of the Congress fully support the statutory interpretation of § 13a(1) heretofore advanced by appellants. Indeed, so contrary to Congressional intent as to the existence of judicial review has been the decision of the District Court as affirmed herein per curiam that remedial legislation has already been introduced in the United States Senate by and on behalf of no less than eight leading Senators.[14] In addition, Senator Williams of New Jersey has introduced a bill on March 18, 1959 making more definite the meaning of § 13a(1) as in conformity to that construction heretofore argued by appellants.[15]

To date, two experienced state regulatory agencies[16] on five separate occasions over the past four years, after full and complete investigation and public hearing, have recognized the need for the continuation of the Weehawken Ferries and have been seeking to effect a remedy to their deficit character but with no cooperation from the railroad. Indeed, the hearing

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[14] S. 1331, 86th Congress, 1st Session, introduced March 9, 1959, by Senator Case of New Jersey on behalf of himself and Senators Bush, Clark, Dodd, Javits, Keating, Newberger and Kuchel. See in addition Vol. 105, Congressional Record, No. 37, from p. 3147 (86th Cong., 1st Session).

[15] See Appendix A.

[16] The Board of Public Utility Commissioners of the State of New Jersey and the Public Service Commission of the State of New York.

examiner of the Interstate Commerce Commission upon the only relevant record ever made before the Commission recommended that discontinuance be permitted only upon condition that the railroad forthwith institute an alternative service.[17] In addition, the Commission has authorized very substantial rate increases of up to 200 per cent which together with a reduction of service to coordinate with the West Shore commuter trains operating into the Weehawken terminal, at which point the commuters load the ferries to continue onto Manhattan, would convert this deficit service into a substantial profit making operation. All of those things were fully known to the Commission, including the existence of more than 7,000 commuters[18] (14,000 round trips) who regularly utilize the ferries. And still the Commission refused to investigate; such is the character of arbitrary action which the Court has found itself powerless to review under § 1336, 28 U.S.C.

Whether the Weehawken ferries are to sink beneath the waters of the Hudson River leaving 7000 commuters to sink or swim may be in itself a matter so local in nature as to collect small national significance. But when the technique and procedure utilized to effect that discontinuance are based upon a statutory interpretation which is having a direct impact upon 27 similar cases[19] involving approximately 100 passenger

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[17] *New York Central—Weehawken Ferry Abandonment*, I.C.C. Finance Docket No. 18781, Examiner's proposed report.

[18] *New York Central R. Co. Ferry Abandonment*, 295 I.C.C. 519, 521 (1957).

[19] Including, among the several proposals of the New York Central R. Co., one to discontinue some but not all of the West Shore trains now dependent upon the continued operation of the ferries. *New York Central R. Co. Discontinuance of Service—Weehawken, N.J.,—West Haverstraw, N.Y.*, I.C.C. Finance Docket No. 20487.

trains in every part of the country currently pending before the Commission, it is submitted that the existence of judicial review under § 1336, 28 U.S.C., obtains a status of national importance calling upon this Court to act in a manner consistent with its past declarations, particularly *Rochester Telephone Corp., supra.*

Upon this petition and the other pleadings herein, appellants respectfully urge this Honorable Court to grant rehearing and, upon further consideration, that its per curiam decision entered hereon on March 2, 1959 granting appellees' motions to affirm and affirming the judgment of the District Court be revoked and, thereafter, probable jurisdiction noted and the case decided on its merits consistent with existing law.

Respectfully submitted,

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Dated: March 18, 1959

Certificate of Counsel

I, William A. Roberts, a member of the Bar of this Court and of counsel for appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

WILLIAM A. ROBERTS,
Attorney for Appellants.

APPENDIX A

Mr. Williams of New Jersey introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce.

A BILL

INTERSTATE COMMERCE ACT
(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13a(1) of the Interstate Commerce Act, as amended, is hereby amended to read as follows:

"Sec. 13a(1). A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon filing of such notice the Commission shall forthwith enter upon an investigation, and set the same for public hearing, of the

proposed discontinuance or change and its effect on public convenience and necessity and upon interstate or foreign commerce. The Commission shall notify the Governor of each State in which such train or ferry is operated of the time and place of such public hearing at least thirty days in advance thereof. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least seven days prior to the day on which such discontinuance or change would otherwise become effective, shall require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation. If, after hearing in such investigation, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.